

**No. 5494**

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IN THE

**United States Circuit Court  
of Appeals**

FOR THE

NINTH CIRCUIT

LEE SAI YING, alias LEE HUNG CHONG, <i>Appellant,</i>
VS.
THE UNITED STATES OF AMERICA, <i>Appellee.</i>

**BRIEF FOR APPELLEE**

Upon Appeal from the United States District Court  
for the Territory of Hawaii

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**Upon Appeal from the United States District Court for the  
Territory of Hawaii**

**STATEMENT**

This is an appeal from the decision of the United States District Court for the Territory of Hawaii in a proceeding begun therein under the provisions of the Chinese Exclusion Act ordering the deportation of appellant from the United States.

In the complaint filed on the 18th day of May, 1927, the appellant was charged with being a person of Chinese descent and a Chinese laborer within the

United States and within the jurisdiction of the United States District Court for the Territory of Hawaii without the certificate of residence required by the Exclusion Act; that he unlawfully obtained admission into the United States by false and fraudulent representation and claim of citizenship, and that he is not lawfully entitled to be or to remain in the United States [Record 3-4.] On May 27, 1927, appellant appeared in court and entered a plea of not guilty to the charges [Record 5.]

The appellant arrived at the port of Honolulu from China on November 27, 1922, applied for admission to the United States on the ground of being Hawaiian born and was admitted as Hawaiian born on December 6, 1922 [Record 68.] At the hearing before the court on June 8, 1927, it was shown that appellant was of the Chinese race, a laborer, within the United States and within the jurisdiction of the trial court without a certificate of residence required by the Exclusion Laws [Record 10-12, 36]; that a certificate of identity issued the appellant by the immigration official in charge at the port of Honolulu on the 1st day of February, 1923, was offered and received in evidence [Record 21-22.] The complete immigration record of appellant including the examination of appellant and his witnesses just prior to his admission in 1923 and the examination of appellant on May 17, 1927, by the immigration officers at Honolulu relative to his lawful right to remain in the United States was also admitted in evidence [Record 24.] The departure record of appellant as appears on the record of his examination

prior to his admission in 1923, shows that "Lee Long, wife and child departed by SS 'City of Peking' October 9, 1897" [Record 68.] The same record appears in the Public Archives of the Territory of Hawaii [Record 26.] It was shown that four (4) boys came to the United States claiming to be the son of Lee Long, who departed October 9, 1897 [Record 27, 53.]

At the hearing before the board of special inquiry the testimony of appellant and three witnesses, viz., Jong Tai Fong, alias Jong Dat Lin; Lee Tan, alias Lee Pui Nam, and Lee Man Kwai, alias Lee Yin Hoo, was taken and considered.

The appellant testified that his name was Lee Sai Ying alias Lee Hung Chong, 27 years of age, born at Smith and Hotel streets, Honolulu, KS. 21-2-25 (March 21, 1895), that his parents so told him; that father was Lee Long alias Lee Ping Pong, and his mother was Wong Shee, natural feet; that he was taken to China by his parents during the 12th month of KS. 23, (December 24, 1897, to January 21, 1898); that the house in which the family lived in their native village in China was near the tail of the village, near the hill. That he knew Lee Man Kwai and Chung Dai Fong but had not seen Lee Dan in China, that he last saw Lee Man Kwai some five or six years prior thereto. When asked when he had last seen Chung Dai Fong (meaning Jong Tai Fong) appellant answered, "He came back to Hawaii this year." Appellant testified that he had not seen Lee Dan in China [Record 55-60.]

Witness Jong Tai Fong alias Jong Dat Lin, testified that prior to his coming to Hawaii in 1898, he visited the house of appellant's father in China, who told him that he had taken "the boy to China a short time ago." It does not appear from what country the father took the boy when he took him to China. The witness further testified that he did not again see the appellant until 1921, when he made a trip to China, some twenty-three years after first seeing him; that appellant's mother, Wong Shee, had natural feet; and that appellant's home was "near the center part of the village—interior part—not outside" [Record 62.] He fixes the birthplace of appellant but does not state the source of his information, and the witness was in China [Record 61] when appellant claims to have been born, and testified he saw him in China before coming to Hawaii.

Lee Tan alias Lee Pui Nam, testified that he knew the parents of appellant and knew that appellant was born in Honolulu because he, the witness, "was a bookkeeper in the corner opposite the house where he lived before and saw him;" that he had not seen appellant since he, the appellant, went to China, some twenty-four years prior to the hearing. No effort was made to have this witness identify the appellant. This witness also testified that the mother of appellant had natural feet.

Lee Man Kwai, alias Lee Yin Hoo, testified that he came to Hawaii in KS. 21 (1895) and that appellant was born "little after a year after I came here." This statement cannot be true, as appellant fixes the

date of his birth at March 21, 1895. When the witness' attention was called to this discrepancy, he stated that some four or five months after his arrival here he called at the home of appellant and appellant "was born then." He also testified that appellant's mother had natural feet; also that he saw the family on all his trips to China, but he does not state when he made those trips, nor does he say ~~when~~ he saw appellant on any of his trips to China.

The appellant, on May 17, 1927, made a voluntary statement under oath to the immigration officers wherein he stated that when he was 13 or 14 years of age his parents for the first time told him he was born in the Hawaiian Islands [Record 36], that before that time he did not know where he was born [Record 37.] On being questioned relative to his mother's feet, appellant testified that when he left China she had bound feet [Record 38], that she had never unbound her feet, that she had always to his knowledge had little feet and bound, that she did not walk a natural gait as other women but walked stiffly, that her feet were "about five inches in length with shoes on," that he had always lived with his mother until he came here in 1922, and there was no excuse for his stating that his mother had natural feet [Record 39]; that he did not know when either of his parents came to Hawaii; that he never saw his witness Lee Tan in China [Record 45]; that he saw his witness Lee Man Kwai in China only once and that was about a year before he came over here [Record 47], contradicting his own testimony given in 1922 [Record 58] wherein he stated he last

saw Lee Man Kwai "five or six years ago" [Record 58.]

At the court hearing appellant was asked the name of his mother and answered, "Wong, her surname is," and when asked the rest of the name, he answered, "Her name is Wong, that is all I know." [Record 15.] Appellant could not remember when his alleged father told him he could come back to Hawaii because he was born here: [Record 16], nor could he remember anything his parents told him about the Hawaiian Islands or the life here, [Record 17] nor could he tell why he went to the grocery store of L. Kwai You immediately upon his arrival [Record 18.]

## ARGUMENT

### I.

**AFTER IT WAS SHOWN THAT APPELLANT WAS OF THE CHINESE RACE AND A LABORER WITHOUT A CERTIFICATE OF RESIDENCE, THE BURDEN WAS WITH HIM TO SHOW AFFIRMATIVELY HIS LAWFUL RIGHT TO REMAIN IN THE UNITED STATES.**

The above announced rule is so consistently supported by decisions and statutes and so generally recognized and followed that it is hardly worth while to cite authorities in its behalf. However, we will mention the cases of *Chin Bak Kan v. United States*, 186 U. S. 193, 200; *Lee Hing v. United States*, 295 F. 642; and *United States v. Goon Bon June*, 19 F. (2d) 333. Section 284, Title 8, U. S. Code, provides that one arrested under the provisions of this chapter shall be adjudged to be unlawfully within the United States

unless he shall establish by affirmative proof to the satisfaction of the court his lawful right to remain in the United States. The requirements of the statute cannot be avoided by a mere assertion of citizenship. The facts on which such claim is rested must be made to appear. *Chin Bak Kan*, supra. The statute demands proof to the satisfaction of the court, not merely a preponderance of evidence. A preponderance of evidence might not be proof to the satisfaction of the court. Mere assertions of one claiming citizenship based on statement of parents is not sufficient. The facts on which the claim is rested must be made to appear. *Soo Hoo Yee*, 3 F. (2d) 592; *United States v. Boon Bon June*, 19 F. (2d) 333. The Government is not called upon in any event to introduce proof that a defendant Chinese is not a citizen of the United States. *Doo Fook v. United States*, 272 F. (2d) 80.

A careful reading of the testimony given the board of special inquiry in 1922, convinces one beyond doubt that appellant should not have been admitted to the United States.

The testimony of Lee Tan alias Lee Pui Nam, may be cast aside as having no probative value. While he testified appellant was born in Honolulu, his reason for so testifying is given in the words that he was "a bookkeeper in the corner opposite the house where he lived before and saw him." The witness admits that he never saw appellant from the time the latter left the Islands until his return some twenty-five years later. No attempt was made to identify appellant on his arrival in 1922 [Record 63-64.]

The testimony of Lee Man Kwai, alias Lee Yin Hoo, is likewise weak and unconvincing. He testified that he came to the Islands during KS. 21, which in our time covers the period from January 26, 1895, to February 12, 1895, and that appellant "was born little after a year after I came here." Upon being informed that appellant claimed to have been born in the second month of KS. 21, and shown the inconsistency, he stated:

"I was admitted here on the first month.

Q. And he was born a year later, was he?

A. I do not know where he lived when I first came here—I went to his house 4 or 5 months later.

Q. Did you see the applicant at that time or was he born later?

A. He was born then." [Record 64-67]

The remaining witness, Jong Tai Fong, alias Jong Dat Lim, testified that he first saw appellant in his father's house in China, before the witness came to Hawaii, and stated that the father "told him he took the boy to China a short time ago". This witness further testified that he did not see appellant again until "last year when I went back to China," some twenty-three years after seeing him before coming to the Islands.

The declaration of the Court in *Gee Fook Sing v. United States* (CCA 9), 49 F. 146, 148 and in *Wong Ching* (CCA 9), 244 F. 410, 412, seems aptly applicable to the facts in this case. The Court said that

the testimony of a Chinese person desiring to enter the United States, declaring he was born here, taken back to China by his parents at an early age, lived there continuously until after passing his majority, and all that he knows of the place of his birth is what his parents told him, deserves very little credence as to the place of his birth; and corroboration by Chinese who confess they have seen him but once or twice during such period of absence is but little, if any, better than hearsay evidence. Mere assertion of being native born based solely on statements of parents is not sufficient to establish the claim of citizenship in a deportation proceeding where the right to remain rests solely upon the citizenship of the defendant. The facts, incidents and circumstances upon which the claim is vested, must be made to appear. *Soo Hoo Yee v. United States*, 3 F. (2d) 592; *United States v. Goon Bon June*, 19 F. (2d) 333; *Chin Bak Kan v. United States*, 186 U. S. 193.

In this case we do not find any corroborative facts, incidents or circumstances. The appellant was not able to remember or relate anything told him by his parents relative to the Islands or life here. The claim of appellant is built on assertions only. The appellant testifies that he was not informed of his birth in the Islands until he was 13 or or 14 years old and before that age did not know where he was born [Record 37.] Quite an unlikely situation to say the least. It may not be out of place to suggest attention to the rule laid down in *Ex parte Jew You On*, 16 F. (2d) 153, 154, that the bare oath of three or four Chinamen, or

other persons, may not necessarily be accepted to prove the citizenship of a Chinese in a deportation proceeding. Were it otherwise, the exclusion policy of the Government would be futile and Chinese admitted to this country would be limited solely by the extent of their courage to take advantage of opportunity.

## II.

### MATERIAL CONTRADICTIONS AND DISCREPANCIES RELATIVE TO HOME AFFAIRS AND FAMILY RENDERS A CLAIM OF CITIZENSHIP OF A CHINESE PERSON INCREDIBLE.

Contradictions in the testimony of a petitioner and discrepancies between his testimony and that of his witnesses relative to home affairs and family may reasonably render incredible his claim to have been born in the United States when his right to remain is based solely upon his citizenship. *Ong Foo v. Nagle*, 22 F. (2d) 774; *Go Lun v. Nagle*, 22 F. (2d) 102.

The contradictions in the testimony of appellant and the discrepancies between his testimony and that of his witnesses is pronounced and relate to the home and family of appellant. There can be no occasion for a mistake relative to the feet of one's mother or to the location of the family home in the native Chinese village. In 1922 before the board of special inquiry, the appellant testified that his mother had natural feet [Record 56] and this declaration was followed by each and all his witnesses. *Jong Tai Fong*, alias *Jong Dat Lim* [Record 61], *Lee Tan* alias *Lee Pui Nam* [Record 63], and *Lee Man Kwai*, alias *Lee Yin Hoo* [Record 66]; each and all gave positive testimony that the mother had natural feet. When appel-

lant was examined by the immigration officers on May 17, 1927, relative to his right to remain in the Islands, the question of the condition of his mother's feet was approached from every possible angle and while on some occasions appellant indicated he would like to harmonize his testimony with that given in 1922, he positively stated on each and every occasion that his mother had bound feet. That he lived at home with his mother prior to his coming to Honolulu and should know the condition of her feet [Record 38, 39, 49, 50.] Again we find discrepancies relative to the location of appellant's home in his native Chinese village. Appellant in 1922, before the board of special inquiry, testified that his home was near the tail of the village, near the hill [Record 58.] He again so testified on May 17, 1927 [Record 44] and is supported by the testimony of Lee Man Kwai [Record 67] but is contradicted by Jong Tai Fong, who looked up the home before coming to Hawaii and who visited the home again the year preceding his giving his testimony and who testified that the home of appellant is "near the center part of the village—interior part—not outside," "not near the sea nor the mountain" [Record 62.] Appellant testified in 1922 that his mother's name was Wong Shee, and when asked her name in the hearing in court said, "Wong, her surname is," and when asked for the rest of the name, replied, "Her name is Wong; that is all I know."

## III.

**FORMAL PLEADINGS ARE NOT REQUIRED IN DEPORTATION PROCEEDINGS.**

Formal complaint or proceeding is not required in deportation proceeding and the want of them does not affect the authority of the court or the validity of the statute. *Fong Yue Ting v. United States*, 149 U. S. 678, 729; *Chin Bak Kan v. United States*, 186 U. S. 193, 199; *Ah Son v. United States*, 200 U. S. 161.

It was also declared that technical objections to the form of the warrant in deportation cases are not sustainable when it appears that the applicant had notice of the actual charges against him in time to meet the same and have a fair trial. *Ex parte Wong Yee Toon*, 227 F. 247, 250; *Ekue v. United States*, 142 U. S. 650; *U. S. v. Hom Lim*, 223 F. 520.

Appellant was charged with being a person of Chinese descent and a laborer and not possessing a certificate of residence as required by the Exclusion Act, and not lawfully entitled to be or remain in the United States. We respectfully contend that that is sufficient to give appellant notice of the charges against him. No complaint is made that he did not have time to meet the same or that he did not have a fair trial. No evidence of fraudulent or false representation or claim was offered because none was needed. The way in which the appellant entered the United States and his status upon and after entry did not call for such evidence or proof.

## IV.

ADMINISTRATIVE ACTION IN PERMITTING A CHINAMAN TO  
LAND IN THE UNITED STATES IS NOT FINAL OR DETER-  
MINATIVE

Sections 153 and 174, Title 8, U. S. Code, make the decision on the question of admission of an applicant final only when adverse to his admission, and then only when approved by the Secretary of Labor. Executive action in permitting an applicant to land is not in any sense judicial, and does not embarrass a court inquiring into the truth of such order.

The force and effect of the executive or administrative action in admitting an applicant to this country and the action of immigration officials issuing a certificate of identity to one so admitted is fully discussed in the brief of appellee in the cause of Lum Man Shing, alias Lum Kam Hoo, v. United States, numbered 5474, now under submission in this court, and as the counsel for appellant in that case is the counsel for appellant in this case, it was considered unnecessary to reprint in full in this case the argument on those points, so reference is respectfully made to appellee's brief, case numbered 5474.

## CONCLUSION

We submit that certificate of identity was not sufficient to throw on the Government the burden of proving that appellant entered the United States by fraudulent means, or that the possession of such certificate in any way determined appellant's right to remain in the United States, or in any way determined

his citizenship, or in any way stood in the way of the Court in determining whether appellant established a lawful right to remain in the United States, and we submit that the trial court did not err in ordering the deportation of appellant, and that the decision of that court should be affirmed.

Respectfully submitted,

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